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**General Motors Corporation and Sharon Bell and Robert John Mullins and Edward Otis Morning.** Cases 7–CA–48275, 7–CA–48367, and 7–CA–48662.

July 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS  
LIEBMAN AND KIRSANOW

The issues presented in this case are (1) whether the judge correctly found that General Motors (the Respondent) violated Section 8(a)(3) by selecting employees Steve Bonzack and Don McConnaughey for promotion to wastewater treatment operator as a favor to Local 735, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union) in disregard of existing selection criteria, and (2) whether the Respondent violated Section 8(a)(1) by informing employees that the promotions were made as a political favor to the Union. We find, in agreement with the judge, that the Respondent violated the Act in both respects.<sup>1</sup>

In finding, however, that the selection of Bonzack and McConnaughey for promotion violated Section 8(a)(3), the judge found *Wright Line*<sup>2</sup> inapplicable and instead applied *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000). Contrary to the judge’s view, we find that the *Wright Line* test applies<sup>3</sup> and has been satisfied by the credited

employee testimony that Respondent’s officials admitted a pronoun motivation in the promotion decision, establishing a discriminatory basis for the Respondent’s departure from its prior use of a math prerequisite for selecting applicants to this position. However, we do not find it relevant, as did the judge, that McConnaughey applied 8 months early for the job posting. The record indicates that other employees also applied before the position was formally posted by the Respondent. Finally, in affirming the judge’s finding that employee Paul Thomas belonged to a group of applicants “head and shoulders” superior to McConnaughey and Bonzack, we rely only on Thomas’ math test and course credentials. We make no determination that he necessarily would have been selected for promotion if the Respondent had acted in a nondiscriminatory manner. As explained in the remedy section below, the issue of which original applicants would have been selected is to be determined in subsequent compliance proceedings.

AMENDED REMEDY

The judge recommended that the Respondent be ordered to rescind the promotions of McConnaughey and Bonzack and then repost the vacancies; evaluate all employee applicants based on nondiscriminatory, neutral criteria; and offer the two most qualified employees an immediate and full promotion to the position, with retroactive seniority and backpay for any losses they may have suffered. Because this remedy, by ordering the reposting of the vacancy, may fail to make whole the applicants who actually suffered loss from the discriminatory failure to promote them when the original vacancy was posted, we find the remedy inadequate.<sup>4</sup> Moreover, although we have found the 8(a)(3) violation under *Wright Line*, the remedial situation is more akin to that presented by a refusal-to-hire violation where the number of applicants exceeds the number of available positions. Thus, the proper remedy for the Respondent’s discriminatory selection of applicants for employment opportunities is set forth in *FES*, 331 NLRB 9, 15 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83

<sup>1</sup> On March 7, 2006, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions except as modified and to adopt the recommended Order as modified and set forth in full below.

The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>3</sup> *Wright Line* applies to all 8(a)(3) and 8(a)(1) allegations that turn, as the instant 8(a)(3) allegation does, on employer motivation. *Nor-Cal Beverage*, supra, upon which the judge relied, is inapposite. That case

involved discipline of an employee for conduct that was part of the res gestae of protected activity. Thus, the employer’s motivation was not at issue. Instead, the result turned on whether the employee used language so offensive as to remove the Act’s protection.

<sup>4</sup> Although no exceptions have been filed to the judge’s remedy in this respect, it is well settled that the Board has “broad discretionary” authority under Sec. 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act. E.g., *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969). It is also firmly established that remedial matters are traditionally within the Board’s province and may be addressed by the Board in the absence of exceptions. E.g., *Schnadig Corp.*, 265 NLRB 147 (1982); *R.J.E. Leasing Corp.*, 262 NLRB 373 fn. 1 (1982) (modified decision).

(3d Cir. 2002). Accordingly, we will modify the judge's recommended Order to comport with *FES*. Thus, the Respondent will be required to promote the two employees from the original applicant group who would have been promoted had the promotion decisions been made in a nondiscriminatory manner, using the neutral criteria then in effect. Any dispute as to the identity of those two applicants will be resolved in a compliance proceeding.<sup>5</sup> The successful applicants shall be given retroactive seniority to the date of the original promotion decision and be made whole for any loss of earnings and other benefits that they may have suffered due to the unlawful actions affecting them, in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondent, General Motors Corporation, Ypsilanti, Michigan, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Telling employees that it promoted Don McConnaughey and Steve Bonzack to the position of waste water treatment operator as a political favor to the Union.

(b) Discriminatorily promoting McConnaughey and Bonzack, or any employee, to the position of waste water treatment operator as a political favor to the Union, in disregard of established procedures requiring consideration and selection for promotion of better qualified applicants.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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<sup>5</sup> Because we acknowledge that that the Respondent cannot meet an obligation to offer promotions within 14 days of this Decision and Order to applicants whose identities are yet to be determined, and because requiring the Respondent to rescind McConnaughey's and Bonzack's promotions within that same 14-day time limit would leave the Respondent with job vacancies that it might not be able to fill until compliance proceedings have run their course, we will modify the judge's Order to remove the 14-day time limits in the provisions requiring rescission and promotion. See *Oasis Mechanical, Inc.*, 346 NLRB No. 91, slip op. at 1 fn. 2 (2006). We emphasize, however, that this variance from our usual time limits does not give the Respondent carte blanche to delay its offers of promotions, and its corresponding rescission of McConnaughey's and Bonzack's promotions, after the promotion-eligible applicants have been ascertained in compliance.

Of course, backpay will be running in favor of the two new selectees, and this will be an incentive for the Respondent to act as soon as possible.

(a) Rescind the promotions of McConnaughey and Bonzack and offer the promotions, with retroactive seniority, to the applicants who would have been promoted if not for the Respondent's prounion discrimination, as determined in compliance proceedings.

(b) Make the two successful applicants whole for any losses they may have suffered by reason of the discrimination against them in the manner set forth in the amended remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Willow Run Powertrain plant and waste water facility in Ypsilanti, Michigan, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 3, 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 31, 2006

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Robert J. Battista,

Chairman

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<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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Wilma B. Liebman, Member

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Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that we promoted employees to the position of wastewater treatment operator as a political favor to Local 735, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the Union).

WE WILL NOT discriminatorily promote employees to the position of waste water treatment operator as a political favor to the Union, in disregard of established procedures requiring consideration and selection for promotion of better qualified applicants.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the promotions of Don McConaughy and Steve Bonzack and offer the promotions, with retroactive seniority, to the applicants who would have received the promotion if not for our prounion discrimination, as determined in compliance proceedings.

WE WILL make the two successful applicants whole for any losses they may have suffered, with interest.

GENERAL MOTORS CORPORATION

*Michael Silverstein, Esq.*, for the General Counsel.

*Mark C. Pieroni, Esq.*, of Detroit, Michigan, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Detroit, Michigan, on September 26 and 27 and October 27, 2005.<sup>1</sup> The charge in Case 7-CA-48275 was filed by Sharon Bell on January 25. The charge in Case 7-CA-48367 was filed Robert John Mullins on February 23. And the charge in Case 7-CA-48662 was filed by Edward Otis Morning on June 3. As here pertinent, the second consolidated amended complaint (complaint) was issued on June 20. It alleges that General Motors Corporation (GM or Respondent) (1) violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act), on about January 20 and 26, by its agents Dennis Deck and Roger Lossing, respectively, at its Willow Run Powertrain plant in Ypsilanti, Michigan, telling employees that it promoted employees Steve Bonzack and Don McConaughy to the position of waste water treatment operator at the request of Local 735, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (Union) as a political favor to the Union, and (2) violated Section 8(a)(1) and (3) of the Act, on about January 3, at its Willow Run Powertrain plant, by promoting Bonzack and McConaughy to the position of waste water treatment operator for the reason specified above.<sup>2</sup> Respondent denies violating the Act as alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Counsel for General Counsel and Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, a corporation, with offices and places of business throughout the United States, has been engaged in the manufacture and non-retail sale of automobiles and related products. Respondent admits that during calendar year 2004, in conducting its business operations, it purchased and received at its facilities in the State of Michigan goods valued in excess of \$50,000 directly from points outside the State of Michigan. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of

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<sup>1</sup> All dates are in 2005 unless otherwise indicated.

<sup>2</sup> The complaint, as here pertinent, requests that Respondent be ordered to take the following affirmative action: (a) rescind the promotions of Bonzack and McConaughy, and (b) repost the 5850 Waste Water Treatment Operators Vacancies, evaluate all employee applicants based on nondiscriminatory, neutral criteria, and offer the two most qualified employees immediate and full promotion to the position of waste water treatment operator with retroactive seniority, and make them whole for any losses they may have suffered, with interest thereon computed in accordance with the policy of the National Labor Relations Board (the Board).

the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

Steven Smith, who has worked at GM's Powertrain at Willow Run since 1976, has been a wastewater treatment operator since 1984. Smith testified that a wastewater treatment operator performs three jobs functions, namely an hourly inspection of the plant's storm water system, separating the soluble water and oil which comes from the plant, and maintaining the bioreactor systems where the water is cleaned. He further testified that presently there are eight wastewater treatment operators; that the old wastewater facility is called building 17; that when the new wastewater facility opened in 1988 he and the other wastewater operators who were working in building 17 had to take and pass a test before they were allowed to work in the new wastewater facility; and that four waste water operators did not pass the test and they were told that they had to stay in building 17 until they were able to pass the test, they were not allowed to come over to the new building and perform any duties until they passed the test. On cross-examination Smith testified that he and the other wastewater operators took the test as a group, sitting around a table in a conference room. Smith further testified as follows:

Q. And were you allowed to discuss answers with one and other as you were taking it?

A. Oh, to some extent yes. [Tr. p. 144.]

Additionally, Smith testified on cross-examination that while there has been an increase in the use of computers at the facility and this made it a little easier to do things, the job assignment remained the same in that the wastewater operators still had to maintain the systems.

In 1999 Morning, who began working at the Willow Run plant in 1976, applied for a wastewater operator position and he was placed in the job in May 1999. Before applying for the wastewater position in 1999, he took a test at the Learning Center Community School which is on GM's Willow Run plant property. Morning testified that when he interviewed for the wastewater position management checked to see if he passed the test; that Lee Burkell, who at the time was in charge of the powerhouse and the wastewater treatment facility and who interviewed him, told him that he had the job; that he worked as a wastewater operator for 1 week; that Linda Cirner in personnel told him that he was removed from the position because someone else had passed the test and that person had more seniority than Morning did; that he filed a grievance over his removal but the grievance was not allowed because the other person had more seniority than he did; and that he learned that Gary Dew received the position in question.

Mullins served three, 3-year terms (1979 to 1982 and 1996 through 2002) as an elected committeeman-at-large on the union shop committee at GM's Willow Run plant.<sup>3</sup> In 1996 and in 1999 he ran against Jim Mull, Ken Figley, and Roger Slone.

<sup>3</sup> Mullins, who has worked at the involved facility since 1995, was also elected union committeeman, and served in this position from 1976 to 1979.

In May 2002, he ran against Mull for bargaining chairman but lost the election. As a result Mullins no longer worked full-time for the union shop committee and he was sent to work as an hourly employee in department 461 as an "MT."

In May 2002 Mullins discussed his returning to a job on the plant floor with Deck, who is GM's supervisor of labor relations at Willow Run, and Deck's boss, Jim McIntosh. Mullins testified that the conversation took place in the labor relations office; that just he, Deck and McIntosh were present; that he lost the election the week before, he was trying to settle some grievances before his last week in office, but the labor relations representative, Jenny McCarley, would not meet with him on the grievances; that he went to see Deck and McIntosh regarding McCarley's refusal to meet with him; that Deck and McIntosh told him that Mull, Sloan, and Figley, the new shop committee, had just asked Deck and McIntosh that Mullins be "cut back" out of his inspector gauge job and be placed in the assembly room; that before serving on the shop committee Mullins worked in inspector gauge; that he objected and indicated that what the new shop committee did was unreasonable; that based on his years of service on the shop committee, he knew that the Union does not have a say on where displaced union officials are relocated; that the proper protocol is that the displaced union official goes back to the last classification he or she held before taking union office; and that while this is not spelled out in the collective-bargaining agreement, it is the past practice.

Later that week Mullins again went to Deck and McIntosh in labor relations to complain about the fact that he was not able to see McCarley. Mullins testified that just he, Deck, and McIntosh were present; that McIntosh said that Shop Chair Mull was serious about Mullins being reduced from inspector gauge and put on the assembly line; that McIntosh also said that Mull wanted Mullins placed on the second shift; and that while he initially protested, eventually he told them that they could put him anywhere they wanted.

Deck, who is the supervisor of labor relations at GM's Powertrain Willow Run plant, testified that he did not recall any conversation in which he told Mullins that the Union was out to get his position or to disadvantage him; and that to his knowledge no union official has ever influenced a placement or selection decision that was made with respect to Mullins, and he never told Mullins that they did.

Mullins was placed in department 461 as a production worker inspecting parts. His supervisor was Sandy Westbrook. Mullins testified that when he reported for work at 7 a.m. on a Monday morning Westbrook told him that Mull, Figley, and Slone spoke to her earlier that morning, asking her to place Mullins on the second shift; that Westbrook told him that she told the three that she did not have an opening on the second shift and Mullins would be working on the first shift; and that later that day he went to personnel and filled out a leveling clause to bump a less senior employee and get a more preferred job.

Westbrook testified that for a week in about 2002 she was Mullins' supervisor; that at the time she did not know Mull; that Mull did not speak to her about Mullins' inspection gauge classification; that Mull did not ask her to move Mullins off first shift; that no member of the union shop committee ever

talked to her about Mullins; that she never told Mullins that Mull or any other union official wanted her to move him or change his shift, his position, or change his classification; and that prior to 2005 she never had a discussion with Mullins about Mull.

A couple of weeks later Mullins spoke with McIntosh in his office. Mullins testified that no one else was present; that McIntosh told him that Mull did not want Mullins' leveling clause honored and said that Mullins was not qualified to be an auditor; that McIntosh said that he was not going to war with the new union shop committee chairman, Mull, over R. J. Mullins; that he told McIntosh that he was more qualified than Mull and the rest of them to be an auditor; and that eventually the Respondent approved his request and he became an inspector auditor.

On June 3, 2002 Mullins reported to the auditing department. His supervisor was Dave Woodard. Mullins testified that he was assigned the first shift (7 a.m. to 3:30 p.m.); that his first morning on the job Woodard told him that the union shop committee, namely Mull, Sloan, and Figley, requested that Mullins be placed on the second shift; that he told Woodward that if that was what he was going to do, he would get a bump slip and with his seniority he would just bump to days; that Woodward told him that Mull told him that Mullins could be placed on any shift for training for up to 30 days; and that when Woodward explained to him that the second shift auditor position works from 11 a.m. to 7:30 p.m., he told Woodward that he would take the job.

In the fall of 2002 Woodward summoned Mullins to his office. Mullins testified that Woodward told him that Mull was upset with the hours that Mullins was working and he wanted Mullins placed on the 3:30 p.m. to midnight shift; that "Woodward told me that he felt bad about it but his hands were tied . . . [and] . . . Mull . . . Figley, and . . . Sloan went to his supervisor, Lynn Gerrit . . . , and he was pretty much instructed to go ahead and change my hours" (tr. p. 29); that Woodward was really upset, he felt bad about the whole thing and the best he could do would be 1 p.m. to 9:30 p.m.; and that he accepted Woodward's proposal.

Woodard, who has been a supervisor at GM's involved plant for four and one half years, testified that he supervised Mullins from June 2002 through May 2005; that Mull, Sloan, and Figley did not ever come to see him about Mullins; that he did not tell Mullins that they all did or that any of them did; that he did not have a conversation with Mullins about changing hours in 2002; that in 2002 or early 2003 two union zone committeemen, Kevin English and Bee Smith, came to him about moving Mullins or another employee to first shift or to second shift and not the split shift that he had assigned; and that he did not change the hours as requested.

In July or August 2003, Mullins enrolled in GM's waste water program so that he could apply for a waste water treatment operator job. Mullins testified that the course was conducted by Rob Brish at the Learning Center, which, as indicated above, is located in a trailer on the Willow Run plant grounds; that he received a certificate for completing the course; that he took a written test on September 30, 2003 and scored 100 percent on the test; that he took the exam because it was his understanding

that it was a prerequisite to even apply for a waste water treatment operator job,<sup>4</sup> and that he took the same math classes and the same examination which Thurman said were a prerequisite and entitled a less senior employee to trump a more senior employee who had not taken the course and passed the examination.

On September 30, 2003, Mullins applied for a waste water treatment operator job but there was no opening at the time. It is his understanding that GM keeps an application on file for 1 year. After that, the employee has to reapply.

On January 5, 2004, Mullins again applied for a waste water treatment job when James Hatfield, who was a waste water treatment operator, told him that he was going to retire and there was going to be an opening. Mullins testified that after he applied the second time for a waste water treatment operator job, he had a conversation with Mull in personnel, asking him if he was aware of his qualifications; and that Mull said that he was aware. On cross-examination Mullins testified that he indicated in his application that he was "head and shoulders" above the other applicants; that this terminology has its roots in umpire decisions; that in a 63(a) transfer seniority is only a factor when all qualifications are equal; and that "head and shoulders" would be considered in terms of the standards that are employed by the umpires. On redirect Mullins testified that when he applied for a waste water treatment operator job the second time McConnaughey was still setting up reservations for the Willow Run plant manager, Kingsley Wooten, as well as Mull's outside activities.

On February 19, 2004 Bell applied for a wastewater operator position because employee Steve Smith told her that Hatfield was about to retire. Bell has worked for GM since 1975, is a member of Local 735, and holds a position with the Union in which she works basically as a liaison<sup>5</sup> between GM manage-

<sup>4</sup> Mullins based this understanding on what he learned in 1997 when he handled a grievance (GC Exh. 2), for employee Sandra Dowell. Mullins testified that she was a higher seniority applicant who had applied for a waste water treatment operator job and management had placed Tom Gwaltney, who had less seniority, in the job; that Labor Relations Representative Laura Thurman took the position that (a) under the collective-bargaining agreement management did not go by seniority but rather the position was awarded on the basis of merit qualifications under paragraph 63(a) of the agreement, (b) Dowell had not completed the prerequisite waste water treatment math course nor did she take the test, and (c) Gwaltney had taken the course at the Willow Run Learning Center, received a certificate of completion, and scored 93 percent on his final examination, GC Exh. 2; that Thurman gave him a copy of Gwaltney's Certificate of Completion and the letter indicating Gwaltney's score on the examination; and that Thurman said during a grievance meeting that the math test was a prerequisite and the fact that Gwaltney had completed the course and passed the examination qualified him over and above Dowell, who had more seniority.

Paragraph 63(a) of the Local Agreement between GM and Local 735, Jt. Exh. 2, reads, as here pertinent, as follows:

1. Paragraph 63(a)—Promotion

. . . .

B. Employees may make application in the Hourly Employment Department. Where ability, merit, and capacity are equal, the applicant with the longest seniority will be given preference.

<sup>5</sup> Bell testified that she is a UAW locally appointed International Representative for Document 46 Quality Network in Human Resources

ment and the Union at Willow Run. She spoke with Wastewater Treatment Supervisor Jamie Seals after she had applied for the position. Bell testified that Seals told her that she had “to take the test, the aptitude test, which is basically a math fulfillment to even be considered for the job” (Tr. p. 78), and that GM made training available at the Learning Center in the trailer on the Willow Run plant grounds for those who wanted to take the test. Seals arranged for her to speak with Roger Lossing, who is in charge of the wastewater treatment at Willow Run. Bell testified that Lossing told her that the test was mandatory, “you have to take the test to even be in there” (transcript page 81) and “the way to get in, you had to take the test” (Id.). Bell also testified that Lossing told her that GM made a class available in the Willow Run trailer, and she “had to fulfill an aptitude math test requirement to get in there to show . . . wastewater treatment capability.” (Tr. p. 82.) Bell testified that she spoke with Brish, who was the instructor in the trailer, and he told her that she “absolutely must take . . . the math aptitude test to even be considered for this job.” (Tr. p. 83.) Bell took GM’s class in the trailer and she took Michigan Environmental classes regarding wastewater. According to Bell, after she enrolled in GM’s class but before she enrolled in the Michigan Environmental classes, she spoke with Assistant Supervisor Linda Cirner in the hourly personnel office. Bell testified that Cirner told her, in the presence of Cindy Kalinski,

[S]he confirmed that a test was required before my application would even be considered—before I would even be considered; not my applica—before I—even if I had an application. This is her—in just the way she said, I can put the application in, but it wasn’t going to even be considered—these are—this is the gist of her conversation, whether I—if I had not—did not have a test on file—if I didn’t have a test on file, I could forget it. [Tr. p. 91.]

....

She said, Sharon, I’m telling you, with a smile, you got to pass that test and you got to have it on record. I says well what if I’m in the class, ‘cause I knew I was going to be in the class, I knew it was going to be a struggle, I said what if I’m in the class, Linda; she says sorry. And I says well what if I’m— she says if your stuff is not up here when the people are selected, they’re not going to call you. [Tr. p. 92.]

Bell testified that Cirner explained that the “stuff” meant “at least a 70 percentile.” (Tr. p. 92.) Bell received an 82 in her final exam for operator training level one on the State examination, and Brish told her that this met GM’s requirement. Bell revised her application to indicate that she passed the test and to give her background. She testified that she brought up “head and shoulders” with Cirner, who only referred to the test.

On cross-examination Bell testified that Brish works for the school district and he has a contract with GM to provide service at the learning center; that she did not take the GM test because Brish told her that with her 82 on the state test, she did not have

to take the GM test; that Brish told her that he would validate her test results and she should take them to Cirner; that the test she took was with the Department of Environmental Quality (DEQ) and her training was in a classroom setting; that she is a Document 46 appointee (Joint Program Representative)<sup>6</sup> and the agreement between GM and the UAW, Joint Exhibit 1, contains the following language: “Joint Program Representatives are eligible for promotion to higher rated jobs on their shift in accordance with Paragraphs (63)(a)(1) and (63)(a)(2) of this Agreement provided they are the most senior applicant and they are capable of doing the job”; and that McConnaughey and Bonzack have more seniority than her.

Lossing, who is the site utility manager responsible for the wastewater department at GM’s Willow Run facility, testified that the completion of a wastewater math class is not a requirement for being assigned to his department as an hourly operator but “it’s nice that they show that initiative” (Tr. p. 238); that the completion of any state course is not required for the wastewater treatment operator position; that he did not tell Bell that wastewater operators had to pass a math test; and that he did talk to Bell about a math test in that Bell gave him a certificate for the test or classes, but “[t]he discussions were short and I don’t recall” (Tr. p. 244).

On August 9, 2004, the opening for a waste water treatment operator job was posted. (Jt. Exh. 6.) Mullins testified that he saw the list of candidates for this job, he was 12th on the list in terms of seniority, and the two highest ranking applicants, in terms of seniority, were McConnaughey and Bonzack. On recross Mullins testified that there were no prerequisites listed on this posting.

James McIntosh, who is the assistant personnel director at the Willow Run facility, testified Mullins came to see him about the wastewater treatment operator’s position a number of times; that Mullins gave him a copy of documents he had submitted with his application for the position; that Mullins asked him if taking a temporary layoff would preclude being considered for the wastewater treatment operator’s position, and he told Mullins it would not; that Mullins told him that other union officials did not want him to have this job and they tried to influence decisions with respect to some of his other jobs; that he believed that before the wastewater operator position was posted he had conversations with Lossing about manpower issues in wastewater; that the manpower issues regarding wastewater were first raised in 2004; and that when he appointed McConnaughey to the wastewater operator position he knew that McConnaughey was a joint representative and would not actually serve in the capacity of a wastewater treatment operator.

On redirect McIntosh testified that he did not pick Paul Thomas as a wastewater treatment operator because even though Thomas worked as a wastewater treatment operator for an extensive period of time, Thomas asked to be removed from

Development (HRD); that Document 46 as described in the national agreement (Jt. Exh. 1), is a joint process working with management and the union.

<sup>6</sup> The joint program representative assists employees and management in implementing an improved working environment with respect to health and safety, joint activities, accommodating disabled people in transition, work/family program, human resources development, joint training, and quality network.

wastewater because he wanted to get a day-shift job, at the time he was removed there was a contractual issue, and he was removed with the understanding that he would not be placed back in the area; that GM had an extensive amount of time in training Thomas and GM wanted someone it could depend on to go out there and do the job; and that Thomas and the Union were told at the time that he would not be considered for future openings.

On recross McIntosh testified that there was nothing in writing memorializing the conversations between management, Thomas, and the Union where management indicated that Thomas would not be considered for future openings; and that Thomas did apply for one of the wastewater treatment operator positions that were filled by McConnaughey and Bonzack.

McIntosh subsequently testified that he was at Willow Run when the new wastewater treatment facility came on line; that he was aware that the employees in building 17 were transferred to the new wastewater building; that he was aware of the fact that before these employees were allowed to transfer they had to pass a math test; that paragraph 63(a) of the national agreement indicates that "where the ability, merit, and capacity are equal, the applicant with the longest seniority will be given preference"; and that GM has not used the math test as a consideration in determining whether an applicant has the ability, merit or capacity.

Deck testified that in paragraph 63(a) of the national agreement cases seniority is extremely important and to take a case on merit, ability, and capacity, it would have to be overwhelming; that those cases where merit, ability, and capacity are overwhelming are referred to as head and shoulders cases; that Respondent's Exhibit 3 contains copies of six umpire decisions, which were decided between 1941 and 1943, and which are binding precedent for GM in its contract administration; that in 1941 paragraph 63(a) contained the language and where "ability, merit, and capacity are equal, the applicant with the longest seniority will be given preference"; that none of the umpire decisions would support the displacement of the most senior applicant; and that seldom is a 63(a) promotion awarded on the basis of anything other than seniority. On cross-examination Deck testified that he was not familiar with and employee in wastewater named Tom Gwaltney, and he was not familiar with Gwaltney's application to become a wastewater operator in 1997.

Bell testified that before a decision was made regarding who should get the position, McConnaughey told her that he did not have to take the test for the wastewater treatment job, the test was not something that was required, the Union goes by seniority, that was what he was going to go on, that's the company's position, and that was not his position.

Morning applied for the wastewater operator position which was posted on August 9, 2004. He testified that he applied for the job because he had the job before, and he thought he would have been the most qualified for the job.<sup>7</sup>

<sup>7</sup> R. Exh. 2 is a copy of a Board charge Morning filled out against the Union over not getting this position. Morning testified that he did not file the charge.

General Counsel's Exhibit 3 is a transfer letter from Personnel effective January 3 which indicates that Bonzack and McConnaughey were being transferred to a waste water treatment operator job. The letter was posted around the plant. On cross-examination Mullins testified that in the last election McConnaughey ran for the same position as Mull. On redirect Mullins testified that at the time he saw this posting McConnaughey was still acting in his union representative capacity.

McIntosh testified that in 2004 the shop committee of the Union indicated to GM that there was inadequate manpower in the wastewater treatment facility and overtime should be minimized; that the Union referred to the section of the agreement with the Local which referred to nine operators in the wastewater department; that this occurred after the retirement of wastewater operator James Hatfield; that GM did not want to add operators because of the cost but about 5 months later a decision was made to add personnel to the wastewater treatment facility; that Lossing did not believe that it was necessary to add manpower; that both the power train managers and Worldwide Facilities Group (WFG), which is responsible for running the wastewater facility, had the responsibility for managing the local agreement; that WFG controlled the decision to add manpower to this department; that in view of the amount of overtime that was being worked in the wastewater department, he recommended to WFG that manpower should be added; that a decision on adding manpower at WFG has to be made above Lossing's head; that he received permission to add heads, he was involved in the selection process, and ultimately he decided who was going to be placed in these positions; that he reviewed the applications and the attached documents, looking to see if any of the applicants would fall into the heads and shoulders category, namely someone who had worked in some form of a wastewater treatment facility and had extensive knowledge of that type of operation; that there was a posting throughout the facility for the openings; that the applications were turned into hourly employment; that Joint Exhibit 4 is a list of the 33 applicants for the wastewater treatment operator position; that Joint Exhibit 5 is a copy of the applications for the involved positions; that there is no requirement for an applicant to complete a math course or take a math test as a condition for being considered for the job; that "if . . . someone . . . had actually worked in a wastewater treatment facility with extensive knowledge, it would be considered" (Tr. p. 157); that the learning curve or break-in time for the involved position is "extremely significant, somewhere close to a year" (Id.); that Morning had worked as a wastewater treatment operator for one week; that Paul Thomas had an extensive amount of time working in a wastewater treatment facility, "but there had been a decision when he was removed" (Tr. p. 158); and that he selected the two most senior candidates.

Because after going through the applications and looking at the criteria that we were looking for, there was no candidate I considered to be head and shoulders. Then we used seniority as the tie breaking [sic]. [Id.]

McIntosh further testified that Mull did not in any way try to get him to pick McConnaughey or Bonzack; that no union official suggested or requested that he not pick Mullins, Bell, or

Morning; that Mull did not suggest, request, or hint that he not pick Mullins; that prior to making the decision he did not review the candidates with any manager or supervisor in the waste water treatment department; that paragraph 63(a) of the national agreement applies; that with respect to the involved position, head and shoulders would mean that the applicant would have the capacity to walk into the job and be successful in operating in a much quicker rate; that under paragraph 63(a) if no candidate has capabilities above others, then seniority is used as the selection criterion; that this approach is not dictated by the collective-bargaining agreement but rather it is derived from umpire rulings; that in his job he comes in contact with members of the union shop committee almost daily; that McConnaughey told him that he would file a charge with the Board if he was not selected; that at the time McConnaughey was a functioning Document 46 appointee, which is described in the national agreement, who worked jointly with management in key areas such as health and safety; that those who hold Document 46 positions are eligible for promotion and transfer during their period of service, and their Document 46 position cannot be used as a justification for denying them another position; that about 90 percent of the people selected to be promoted in the plant are selected by seniority; that he did not believe that any of the Charging Parties were head and shoulders more qualified than McConnaughey and Bonzack; that McConnaughey was active in the Union but he had never met Bonzack before the involved openings; that Plant Manager Kingsley Wooten was not involved in the decision making process; that the math score was not a criteria for getting the wastewater treatment operator's job but it is a criteria for holding the job; and that the selection of McConnaughey and Bonzack was not a favor to anyone.

On cross-examination McIntosh, who has been the assistant personnel director since 1993, testified that he does not handle all of the 63(a) applications but he got involved in this one because there was a concern over whether or not to add manpower; that he was not aware that Tom Gwaltney was not the most senior applicant for a wastewater position in 1997 yet he received the job; that he was aware that neither McConnaughey nor Bonzack had taken the math test when they were promoted to the wastewater treatment positions effective January 3; that the application of Paul Thomas is included in Joint Exhibit 5; and that when he chose McConnaughey and Bonzack he was aware that applicant Paul Thomas had worked in wastewater for more than 15 years.

McConnaughey testified that he has worked for GM for 38 years; that he received the classification of wastewater treatment operator in January 2005 and he first worked in the classification in March 2005; that he passed the math test before he actually started working in the department but he did not take it before receiving the classification; that Mull is union chairperson of the plant; that he has held union elective positions in the past, namely shop committeeman, and education chairman; that when he applied for the wastewater treatment operator position he was a Document 46 Quality Network Representative who coordinated the activities of all of the Union's and management's joint programs in the plant which include ergonomics, health and safety, training, quality network, workplace organi-

zation, and visual control; that after no action had been taken in his application for a wastewater treatment operator's job he went to Mull's office and he told Mull and McIntosh, who was present, that he was entitled to the job and if he did not get it he was going to file a charge with the Board; and that he did tell Bell that the wastewater math test was not a prerequisite for the position. On cross-examination McConnaughey testified that he was not aware of Tom Gwaltney's appointment to wastewater in 1997; that he is not aware of all of the 63(a) appointments that have been made in the involved plant; that his dealings with Wooten were limited to monthly quality network meetings with the whole shop committee; and that other than saying hello to Wooten in the hallway he has never had a one-on-one conversation with Wooten.

Bonzack testified that he has worked at GM Powertrain for almost 33 years; that he is a member of the Union but he is not involved in Union politics; and that he is not a friend of Mull or anyone on the union shop committee. On cross-examination Bonzack testified that as of the time of his testimony at the trial herein he had not taken the wastewater math test.

Bell asked her union committeeman, Randy Schutfield, to find out whether McConnaughey or Bonzack took the test. Bell testified that Schutfield told her that what occurred was a favor between the Union and management.

Bell also spoke with Lossing on the telephone. Bell testified that Lossing

told me he was sick of what happened. He didn't agree with it. He explained to me that he had had employees that the test wasn't [a] requirement. He didn't have nothing [sic] to do with it. It was people higher than him. It was—it come from labor relations and the union, that he didn't—he was on vacation and hired these people were coming into his group, he didn't know. But that part of his responsibility is to have good, trained people and that part of that criteria [sic] was to take that test. And he gave me an example of how when he was in the old building, people were not even allowed to come in the new building without taking the test. And he said he was totally upset and I told him I was going all the way. I wanted his boss's name at headquarters. I wanted him to explain the exact procedure, proper procedure to me. [Tr. p. 106.]

Bell also testified that Lossing said that

he was sick of the politics that was going on between management and the union when they can shove people in the program and violate the right procedures and not follow the right procedures and do what they want to do.

....

And he also said that he told my committeeman that which my committeeman said that to me. [Tr. p. 107.]

Further, Bell testified that Lossing said that

union and management at the top personnel and the union leadership at our plant do what they want to do when they want to do stuff. And that when they do stuff like that, that was out of his control and he couldn't do nothing [sic] about it. I could—should pursue it—because his hands was [sic] tied, he could not.



....  
 .... He says I'm in the union and I have an opportunity to fight things. He mentioned that he was thinking about quitting too because stuff like that was making him sick plus he was responsible for anything that happens at that plant and if he gets people that's not adequate, there was safety issues and he had to be certified and that kind of stuff is not good for the safety of the plant. [Tr. pp. 108–109.]

A week or two after he saw the transfer letter, Mullins spoke with McIntosh in Labor Relations. Mullins testified that no one else was present; and that McIntosh told him that the Union was not in support of him getting the position, and the decision was made over his head. Around the same time Mullins went to Deck's office to ask him why he did not get the job. Mullins testified that no one else was present; and that Deck said that they liked McConnaughey and they did the Union a political favor.

On January 26, 2005, Mullins spoke with Lossing, who is in charge of the waste water treatment operators. Mullins testified that the conversation took place in Lossing's office in the powerhouse which is behind the plant on Willow Run property; that no one else was present; that he asked Lossing why they chose the candidates they chose; and that Lossing

said that he was upset about the whole situation, but normally he's in the loop of what employees come to work for him. And he said that on this one, he was cut completely out of the loop. And when he spoke to his supervisor why he was cut out of the loop, his supervisor told him don't ask questions, keep his nose out of it, that this one was elevated to a political level and ....

....  
 he went on to say that on this one here he was cut out of the loop and he was upset about it and everything that had happened was handled between labor relations and the union at the highest levels of labor relations and union.

....  
 he went on to say that everything was handled by the plant manager of our plant, Kingsley Wooten, and Pontiac Headquarters downtown ....

....  
 this thing was elevated all the way to the top and it went over the personnel director, Mike Anderson's head. ....

....  
 Mr. Lossing had said that he thought the whole thing was ... "a shady deal" and that he had never seen anything handled like this before and that management had ... "cut a double deal" that they brought two employees in to replace only one that had retired. And that one of them was a union member.

....  
 [and] the union member wasn't even required to report to the job, that he was just given a pay rate. [Tr. pp. 56, 57, and 58]

Mullins also testified that he asked Lossing if he had ever known a plant manager to get involved on a transfer before and Lossing said "no" but here "the plant manager was involved ... [and] ... everything is totally hush-hush" (Tr. p. 57); that he

asked Lossing wasn't the math test a prerequisite before you can even apply for the job and Lossing agreed that it was a prerequisite to apply for the job; that Lossing cited as an example the fact that when the new waste water treatment plant was built, the employees working in the old waste water treatment plant were not allowed to move to the new waste water treatment plant until they had completed the math course; that Lossing indicated that he was the supervisor in the waste water treatment plant when the new facility was built; and that McConnaughey was working at some appointed position for chairman Mull as a party and trip planner for the Union and for management.

Lossing testified that he resisted the addition of heads to his department because it was part of his job to control his budget and one way to do this was to keep the number of employees working in his department as low as possible; that he did not have any objections to any particular candidates for the position; that he did not play any role in selecting McConnaughey or Bonzack and he did not suggest to anyone in Labor Relations that they ought to be selected; that the on-the-job training in his department usually takes a year or longer; that he took the State of Michigan, Department of Environmental Quality, Industrial Wastewater Treatment Courses I and II and these general courses do not make a person job ready for the hourly positions in his department because every plant is unique; that to his knowledge there is no training program or degree available that would make a person job ready to come to work in his department; that taking the math course and passing the test prior to selection for the wastewater job would not reduce the training time required in any material way; that no Union official tried to influence him with respect to who was chosen for the positions; that Bell visited his office on at least two occasions; that he told Bell that he was angry that the head count or number of employees was being increased in his area; that he discussed the wastewater job with Mullins on at least two occasions; that the first time Mullins came to his office and introduced himself and handed him a certificate, which was not "a bad thing because it shows interest" (Tr. pp. 244 and 245); that he told Mullins that he was adamant in that he did not want to add to the head count; that as he told Mullins, he was upset and he was out of the loop; and that he told Mullins that

the decision to replace head count in the wastewater treatment plant was taking place over my head, that I was not consulted nor was I informed, and being the manager of the area, of course, I was upset because I take ownership and a lot of pride in my job. [Tr. p. 245.]

Lossing further testified that, with respect to Mullins testimony that he told him that Wooten selected McConnaughey, he had no idea who made the final decision; that he did tell Mullins that everything that took place, took place over his head; that he has never been the decision maker on which applicant is selected for the wastewater department; that the selection is done through Labor Relations; and that when Gwaltney was added as a wastewater operator, Lee Burkell, who was the powerhouse chief at the time, made a recommendation on behalf of Gwaltney, who was a janitor in the department at the time. On cross-examination Lossing testified that he has been a supervisor of

wastewater treatment even before the new building, building 116, opened. He gave the following testimony on cross:

Q. You were aware of wastewater operators being required to take the Employer's math test before transitioning to the new building?

A. Being a requirement?

Q. Were the wastewater operators in Building 17 required to take the math test before they started in the new building?

A. It was encouraged that they completed the on site training that was conducted at the new wastewater treatment plant.

Q. And did this on site training include a math test?

A. It—math was part of it.

Q. So the on site training included a math test?

A. Right. [Tr. p. 252.]

Subsequently Loosing testified that while he determines head count needs, his determination can be overruled by Labor Relations, his upper management in GM's WFG, and the plant manager at Willow Run. On redirect Loosing testified that he did not tell anyone that the plant manager was involved in this particular decision; and to his knowledge the plant manager was not involved.

Paul Edward Thomas Jr., who started working at GM's Powertrain in 1977, testified on rebuttal that he is a member of the Union; that he worked in wastewater treatment at the involved facility for three months in 1980 covering for an employee who had a heart attack; that at the end of the three months the General Foreman, Steve Hite, told him that he would probably get the next opening in wastewater treatment; that about 2 months later he was given a wastewater treatment operator position with the understanding that if he did not like it, he could give it up in a year; that he started full time in wastewater in building 17 in 1980 or 1981; that he transitioned over to the new building; that management told him that he was required to take a test before he could work in the new building; that management told him that if he did not pass the test, he could not work in the new building; that he passed the test; that he worked the second shift from 2 p.m. to 10 p.m.; that in 1998 or 1999 he left his wastewater position because his daughter was having problems at school and he needed to work days so that he could help her regarding her schooling; that he did not have enough seniority in wastewater to bump to another shift; that he told Lee Burkell, who was the chief engineer, and Harry Stoddard, who was his acting foreman, of his decision to leave wastewater; that no one in management ever told him that he would not be considered for future openings in wastewater; that he told Union officials Jim Hatfield, who was the bargaining chairman, and Rick Sutton, who was his committeeman, that he needed to leave wastewater; that no one from the Union told him that he would not be considered for future openings in wastewater but rather he was told by Hatfield and either Stoddard or Burkell that if there was an opening and he applied for it, he would be back; that at the time he testified at the trial herein he still had the classification of wastewater; that he never agreed with either management or the Union not to apply for future wastewater openings; that when he saw the posting for an opening in

wastewater in 2004 he applied because he was having back problems and he thought it might be easier on him in wastewater; that he indicated in his application that he had taken the state exams, he held four classifications in wastewater, and he worked as a wastewater treatment operator for at least 15 years; that he spoke with Deck after he applied for the wastewater opening; and that he showed Deck his application, Deck said that he was more than qualified, he told Deck about getting back, and Deck said that he would take it to his boss, Jim McIntosh.

On cross-examination Paul Thomas testified that when he left wastewater he was told that with the schooling that GM had invested in him, he would always be a wastewater treatment operator and all he had to do was reapply to get the job again when there was an opening; and that his paycheck is no longer the wage rate of a wastewater operator but it indicates that group.

Subsequently Paul Thomas testified that the wastewater operators took the test to go from building 17 to the new wastewater building, 116, in the lab in building 116; that there was a big table and all of the operators sat around it; and that the operators did not discuss the answers.

Joint Exhibit 7 is a copy of the math tests of (1) Kenneth Sears, which is dated "1-13-98" and which is titled Waste Water Operator Examination Analytical Problems—II January 3, 1989, (2) Robert Lorraine, which is dated "5-13-98" and has the same title as the examination described in (1) above, (3) Edward Morning, which is dated "27 April 1999" and has the same title as the examination described in (1) above, (4) Mullins, which is dated "Tues. 9-30-03" and is titled Waste Water Operator Examination Analytical Problems—II September 30, 2003, and (5) McConnaughey, which is dated "2-23-05" and which is titled Waste Water Operator Examination Analytical Problems February 26, 2005.

#### Contentions

On brief, Counsel for General Counsel contends that the evidence of record shows that (1) Deck, who is a supervisor of Labor Relations, admitted to an employee that GM promoted McConnaughey as a political favor to the Union, (2) Lossing, who is a waste water supervisor and site engineer, admitted to employees that the involved vacancies were handled at a political level, (3) GM's waste water math class and exam were prerequisites to receiving promotions as waste water operators, (4) Section 63(a) of the involved agreement requires GM to consider 'ability, merit, and capacity' of the applicants before seniority considerations, (5) the Charging Parties were "head and shoulders" candidates for taking and passing waste water preparation classes and exams, (6) Paul Thomas was the clear "head and shoulders" applicant for the waste water vacancy because he worked in that position for 15 years, and (7) neither McConnaughey nor Bonzack previously worked in waste water nor passed GM's waste water math exam at the time of their promotion to the classification; that it is an unfair labor practice for an employer to encourage or discourage membership in a labor organization by means of discrimination; that Section 63(a) governs this case in that all 33 applicants earned less money than waste water operators, and Section 63(b), which

speaks strictly to seniority, governs transfers to equal or lower paying jobs; that GM's unexplained failure to call its admitted agent and current waste water supervisor Seals to rebut any of the remarks Bell attributed to him gives rise to an adverse inference that Seals would have testified against GM's interest, *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, fn 1 (1977) and *Colorflo Decorator Products*, 228 NLRB 408, 410 (1977); that while McIntosh testified that passing the math test was a requirement for holding the waste water treatment operator's job, he did not indicate at what point someone who was placed in this position would have to pass the exam; that in the Gwaltney case management argued and the Union agreed that the math course and test propelled him, a lower seniority applicant, into a "head and shoulders" status; that here GM discriminated against all waste water applicants and encouraged membership in the Union by flouting 63(a) precedent and favoring the politically connected McConnaughey for the waste water operator vacancy to the detriment of more objectively qualified applicants; that an outstanding employee, "head and shoulders" above others in ability, merit and capacity, is entitled to promotion irrespective of seniority considerations, *Chevrolet Gear & Axle*, Umpire Decision No. B-52 (December 30, 1941);<sup>8</sup> that the Respondent repeatedly told applicants that the waste water math class and test were prerequisites for promotion into the department; that when Dowell, a higher seniority applicant who had not taken the waste water math examination, grieved the promotion of Gwaltney, a lower seniority applicant, to a vacancy in waste water, management (a) contended that it appropriately applied Section 63(a) in this selection because Gwaltney's "ability, merit, and capacity" made him a "head and shoulders" candidate, and (b) submitted to the Union copies of Gwaltney's waste water math test score and certificate of completion of GM's waste water math class; that among the 2004 applicants, Paul Thomas was the clear "head and shoulders" candidate to fill the waste water vacancy; that management has no explanation for why Paul Thomas was not chosen; that in bypassing the clear "head and shoulders" candidate, the only logical conclusion for the Respondent's action is that it promoted McConnaughey as a political favor to the Union; that Deck's and Lossing's admissions to employees confirm that management and the Union ignored decades of Section 63(a) precedent to place their preferred candidate into the lucrative waste water classification; and that by encouraging the support of a labor organization and by discriminating against the non-politically connected applicants for the waste water vacancy, the Respondent violated Section 8(a)(3) of the Act, *Joy Technologies*, 306 NLRB 1 (1992).

Respondent on brief contends that the Board's allegations are untrue and unsupportable; that the Board has failed to carry its burden in this case; that the Board admitted that it did not think there was a case against the Union; that this makes it impossible for GM to have promoted McConnaughey and Bonzack at the Union's request as a political favor to the Union; that GM's selection of McConnaughey and Bonzack was based solely on their seniority and the selection was made without

any unlawful animus; that passing a math test is not a prerequisite for placement as a wastewater operator; that no GM supervisor said that employee selections or placements were the product of union demands or acquiescence to them; that despite his prior experience, GM does not believe that Paul Thomas is a better candidate than McConnaughey and Bonzack, and even though this was not an issue on which GM put on evidence, his selection was not avoided due to any unlawful motive; that a math test has no proven value to GM; that while it appears that one employee, Tom Gwaltney, was assigned to the department on a "head and shoulders" basis in 1997, this does not establish the norm because Gwaltney, who passed the math test before the assignment, already worked in the department as a janitor and he had the recommendation of the department manager; that it is the Board's burden to prove unlawful animus; and that even if the Board has proven that Deck or Lossing told employees that GM had promoted McConnaughey and Bonzack at the Union's request as a political favor to the Union, which GM denies, the proper remedy is to tell GM not to make those kinds of statements, and McConnaughey and Bonzack should not be removed from their jobs and a new selection process should not be ordered.

#### Analysis

As here pertinent, paragraph 63 of the National Agreement between GM and the UAW, Joint Exhibit 1, reads as follows:

(63) The transferring of employees is solely the responsibility of Management subject to the following subparagraphs. The provisions of this paragraph shall be applied without discrimination because of race, religion, color, age, sex, disability, sexual orientation, or national origin, so that equal employment opportunity will be afforded to all employees.

....  
(63(a) (1) Employees who desire advancement to higher paid classifications within their department or other established broader scope of selection, may make application to their supervisor or the Personnel Department on forms provided by the Corporation on which they may state their qualifications and experience. Thereafter, as openings occur, selection for the promotion will be from among such applicants and applicants for that classification that have filed pursuant to sub-Paragraph (2) below, who have applied at least one (1) week in advance of the opening in question, and where ability, merit, and capacity are equal, the applicant with the longest seniority will be given preference.

And, as here pertinent, paragraph 63(a) of the Local Agreement, Joint Exhibit 2, reads as follows:

B. Employees may make application in the Hourly Employment Department. Where ability, merit, and capacity are equal, the applicant with the longest seniority will be given preference.

In one of the Umpire decisions introduced by GM, namely No. B-52, dated December 30, 1941, it is indicated that

<sup>8</sup> This Umpire Decision is the first of six Umpire Decisions introduced by GM as R. Exh. 3.

In order to give meaning to Paragraph 63 as written, and in order to preclude the nullification of the seniority factor mentioned in it, the following procedure may well be followed:

- (a) An outstanding employee, "head and shoulders" above others in ability, merit and capacity is entitled to promotion irrespective of seniority considerations. If necessary, management should have no difficulty in pointing out the factors that account for his superior qualifications.
- (b) When such an outstanding employee is not available, management may select several employees whose "ability, merit and capacity" are adjudged by management to be approximately equal. The individual in the group with greatest seniority may then be selected for the promotion. Such an approach reserves to management the right to make selections for promotion while giving proper weight to the seniority factor mentioned in Paragraph 63.

Respondent went to great lengths to promote McConaughy.<sup>9</sup> GM disregarded paragraph 63 of the national and local agreements, and it disregarded the above-described umpire decision, which it introduced to show under what guidelines it operates. GM's witnesses tried unsuccessfully to get around or play down the obvious. First, with respect to what has to be the greatest challenge to the position GM has taken in this proceeding, McIntosh, who concedes that the application of Paul Thomas is included in Joint Exhibit 5 herein, testified that Thomas was removed from the wastewater department with the understanding that he would not be placed back in the area, GM had an extensive amount of time in training Thomas, GM wanted someone it could depend on to go out there and do the job, and Thomas and the Union were told at the time that he would not be considered for future openings. But on recross McIntosh admitted that there was nothing in writing memorializing the conversations between management, Thomas, and the Union where management indicated that Thomas would not be considered for future openings; and that Thomas did apply for the involved position. This latter fact brings up an interesting question, namely why would someone who was advised that he would not be considered for future openings in the wastewater department even file an application to do just that. If McIntosh is credible, why wouldn't a document have been placed in Thomas' file so that years later if he sought to go back into the wastewater department those who were in management at that time would have a memorialization of management's intent? Why wasn't Thomas' involved application rejected in 2004? Why wasn't Thomas reminded of the alleged agreement when he filed his application in 2004? Deck did not specifically deny Paul Thomas' testimony that he told Thomas that he was more

than qualified for the involved wastewater opening. Paul Thomas' testimony is credited. If there was an understanding between management, on the one hand, and Paul Thomas and the Union, on the other hand, why didn't Deck know about it? If there was an understanding why wasn't a Union representative called by GM to corroborate McIntosh? Paul Thomas denied any such understanding. His testimony is credited. Why was Paul Thomas' application included in Joint Exhibit 5 without so much as a dated notation thereon by management that Thomas would not be considered because of the prior understanding? The answer is obvious. McIntosh is not telling the truth. Paul Thomas was a "head and shoulders" applicant. The fact that GM did not choose him on this basis shows GM's true intent, namely McConaughy was going to get the position notwithstanding paragraph 63 of the agreements between GM and the UAW and the involved Local. McIntosh is not a credible witness. His testimony about the alleged understanding is nothing more than a fabrication. None of his testimony will be credited unless it is corroborated by a reliable witness or a reliable document.

Second, with respect to the fact that in 1988 GM required the wastewater operators to take the math course and pass the math test before they could work in the new building Lossing, as noted above, gave the following testimony on cross:

Q. You were aware of wastewater operators being required to take the Employer's math test before transitioning to the new building?

A. Being a requirement?

Q. Were the wastewater operators in Building 17 required to take the math test before they started in the new building?

A. It was encouraged that they completed the on site training that was conducted at the new wastewater treatment plant.

Q. And did this on site training include a math test?

A. It—math was part of it.

Q. So the on site training included a math test?

A. Right. [Tr. p. 252.]

One can see that with this testimony Lossing was trying to avoid having to admit that more than just training was involved. The wastewater operators were required to pass the test before they were allowed to work in the new building. McIntosh, while admitting that he was aware that the wastewater operators were required to pass the math test before being allowed to transfer into the new building, tried to play down this fact by indicating that GM has not used the math test as a consideration in determining whether an applicant has ability merit or capacity. But GM did just that when it chose Gwaltney on a head and shoulders basis over a more senior employee because Gwaltney had passed the math test. McIntosh refers to a recommendation Gwaltney allegedly had from Burkell. The alleged recommendation was not introduced into evidence. Burkell did not testify about any such recommendation. Paragraph 63 does not refer to such recommendations. And as noted above, McIntosh is not a credible witness. As noted above, on cross-examination Smith testified that before being allowed to work in the new building, he and the other wastewater operators took a math test as a

<sup>9</sup> Bonzack was promoted simply because GM had chosen, contrary to paragraph 63 of both the national and local agreements, to use seniority, excluding in the process the consideration of head and shoulders, as the justification for McConaughy's promotion. Once it took this approach, GM had no choice but to give a promotion to Bonzack also. GM was not doing the Union any favor regarding Bonzack. His promotion is strictly a byproduct of GM's approach regarding McConaughy.

group, sitting around a table in a conference room, and “to some extent” discussing the answers with one and another while they were taking the test. Paul Thomas, who also took the test at a big table with the other operators in the lab in building 116 before being allowed to work in the new building, testified that the operators did not discuss the answers. Is it possible that the test was given to two groups at different times so that some employees were working in the waste water facility while others were taking the test. Exactly what Smith meant by “to some extent” was not clarified. What is undisputed, however, is that four of the operators did not pass the test, and they were not allowed at that time to commence working in the new building. If there was a work force of about eight employees in the wastewater department at that time, about 50 percent of the wastewater operators failed the test. If the answers were supplied and this was just an exercise, one would not expect such a high failure rate. It is concluded that when the new wastewater building was staffed, it was a prerequisite that the operators pass the involved math test.

Did taking the math course and passing the math test continue to be a prerequisite for someone to work as a wastewater operator? Since GM’s labor relations representative Laura Thurman did not testify at the trial herein, Mullins’ testimony that she told him that taking the math course and passing the math test entitled a less senior employee to trump a more senior employee who had not taken the course and passed the examination is not refuted. Mullins’ testimony is credited. As noted above, Bell testified that Wastewater Treatment Supervisor Seals told her that she had “to take the test, the aptitude test, which is basically a math fulfillment to even be considered for the job” (Tr. p. 78). GM did not call Seals as a witness. Also, as noted above, Counsel for General Counsel contends that GM’s unexplained failure to call its admitted agent and current waste water supervisor Seals to rebut any the remarks Bell attributed to him gives rise to an adverse inference that Seals would have testified against GM’s interest, *Martin Luther King, Sr., Nursing Center*, supra. An adverse inference is warranted that had Seals testified, he would have testified against GM’s interest. On the one hand, Bell testified that Lossing told her that the test was mandatory, “you have to take the test to even be in there” (transcript page 81) and “the way to get in, you had to take the test” (Id.). On the other hand, Lossing testified that he did not tell Bell that wastewater operators had to pass a math test (It is not clear why in 2004 if a person is already a wastewater operator he or she would have to pass a math test.) but he did talk to Bell about a math test in that Bell gave him a certificates for the test or classes, but “[t]he discussions were short and I don’t recall” (transcript page 244). Lossing did not specifically denying telling Bell “you have to take the test to even be in there” (transcript page 81) and “the way to get in, you had to take the test” (Id.). Bell’s testimony is credited. Lossing told her that passing the test was a prerequisite for being considered for the wastewater operator position. Cirner, who works in the Personnel office at GM, told Bell that passing the math test was required before Bell’s application would even be considered. Since Cirner did not testify at the trial herein, Bell’s testimony, which is not refuted, is credited. Lossing did not specifically deny Mullins’ testimony that he told Mullins that the math test

was a prerequisite before an employee can even apply for the wastewater operator position. Since, in my opinion it was determined that McConnaughey was the chosen even before the position was posted, there would be no reason to indicate in the posting that passing the math test was a prerequisite. It is noted that McConnaughey applied for the position approximately eight months before the openings were posted, Joint Exhibit 5.

Why were the rules not followed in making the choice? Lossing, Deck, and McIntosh themselves told the employees why. Deck did not specifically deny that he told Mullins that they liked McConnaughey and they did the Union a political favor. Mullins’ testimony on this point is credited. Lossing, like McIntosh was not a credible witness. Lossing would not even admit the obvious without being pressed on cross-examination. Before McConnaughey was chosen, passing the math test was required for applying for the involved position. Lossing admitted this to employees. Yet he testified at the trial herein contrary to his prior admissions. Bell’s testimony that Lossing admitted to her that he told her union committeeman, Schufeldt, that what occurred was a favor between the Union and management is credited. Mullins’ testimony that McIntosh told him that the Union did not support Mullins getting the position and the decision was made over McIntosh’s head was not specifically denied by McIntosh. Moreover, as indicated above, McIntosh is not a credible witness. Mullins’ testimony about what McIntosh told him is credited. As noted above, Lossing testified, regarding Mullins’ testimony that Lossing told him that Wooten selected McConnaughey, that he, Lossing, had no idea who made the final decision, and he did not tell anyone that the plant manager was involved in this particular decision. Lossing was not a credible witness. Mullins’ testimony that Lossing told him that everything was handled by plant manager Wooten, and Pontiac Headquarters downtown is credited. Wooten did not testify at the trial herein and, therefore, he did not deny that he played a role in the choice of McConnaughey to become a wastewater operator before he even took the required math test.

Paragraph 8 of the complaint alleges that on about January 20 and 26, Respondent, by its agents Deck and Lossing, respectively, at its Willow Run Powertrain plant, told employees that it promoted Bonzack and McConnaughey to the position of wastewater treatment operator at the Union’s request as a political favor to the Union. As found above, Respondent engaged in the alleged conduct. Accordingly, Respondent violated Section 8(a) (1) of the Act as alleged by interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

Paragraphs 7 and 9 of the complaint collectively allege that on about January 3 Respondent, at its Willow Run Powertrain plant, promoted Bonzack and McConnaughey to the positions of waste water treatment operator at the Union’s request as a political favor to the Union, favoring the employees promoted and blocking the promotions of the Charging Parties, all employees. As concluded above, Respondent engaged in the conduct alleged in these two paragraphs. But for this proceeding, Respondent’s conduct would undoubtedly result in the employees viewing the Union’s exercise of power as a message that for them to have a like opportunity they would have to become

more active Union members, and act in a way that would cause the Union and management to favor them over other employees notwithstanding the involved collective-bargaining agreements, precedent, and the prerequisite math test. *Radio Officers v. NLRB (A.H. Bull S.S. Co.)*, 347 U.S. 17 (1954). In cases such as the one at hand, when the union or the company alone is charged, the liability must be borne entirely by that one entity. (Id.) The absence of joinder of the Union neither precludes the filing of the unfair labor practice charges nor the entry of a backpay order against only the employer, GM. (Id.) A *Wright Line*<sup>10</sup> analysis would not be proper in this case since GM managers admitted to employees that they promoted McConnaughey and Bonzack for an unlawful reason, namely their discriminatory decision was unlawfully based strictly on pro-union motivation, *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000). GM unlawfully discriminated, contrary to provisions in the involved collective-bargaining agreements, umpire decisions, and their own prerequisite to pass a math test, against the Charging Parties and any other applicant for the involved wastewater treatment operator position. GM violated the Act as alleged in these paragraphs.

#### CONCLUSIONS OF LAW

1. GM is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By Respondent on January 20 and 26, by its agents Deck and Lossing, respectively, at its Willow Run Powertrain plant, telling employees that it promoted Bonzack and McConnaughey to the position of wastewater treatment operator at the Union's request as a political favor to the Union, GM violated Section 8(a)(1) of the Act.
4. By Respondent, on about January 3, at its Willow Run Powertrain plant, promoting Bonzack and McConnaughey to the positions of waste water treatment operator at the Union's request as a political favor to the Union, favoring the employees promoted and blocking the promotions of the Charging Parties, all employees, GM violated Section 8(a)(3) and (1) of the Act.
5. The above unfair practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Since the Respondent filled the involved positions in an unlawful discriminatory manner, it shall (a) rescind the promotions of Steve Bonzack and Don McConnaughey, and (b) repost the 5850 Waste Water Treatment Operator Vacancies, evaluate all employee applicants based on nondiscriminatory,

neutral criteria, and offer the two most qualified employees immediate and full promotion to the position of waste water treatment operator with retroactive seniority, and make them whole for any losses they may have suffered, with interest thereon in accordance with Board policy as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

#### ORDER

The Respondent, General Motors Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Telling employees that it promoted Bonzack and McConnaughey to the position of wastewater treatment operator at the Union's request as a political favor to the Union.
  - (b) Promoting Bonzack and McConnaughey to the positions of waste water treatment operator at the Union's request as a political favor to the Union, favoring the employees promoted and blocking the promotions of the Charging Parties, all employees.
  - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order (a) rescind the promotions of Steve Bonzack and Don McConnaughey, and (b) repost the 5850 Waste Water Treatment Operator Vacancies, evaluate all employee applicants based on nondiscriminatory, neutral criteria, and offer the two most qualified employees immediate and full promotion to the position of waste water treatment operator with retroactive seniority, and make them whole for any losses they may have suffered, with interest thereon in accordance with Board policy as set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Willow Run Powertrain plant and wastewater facility in Ypsilanti, Michigan, copies of the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional

<sup>10</sup> 251 NLRB 1083 (1980) enf'd. 662 F. 2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S.393 (1983).

<sup>11</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>12</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judge's

Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 3, 2005.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 7, 2006.

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT tell you that we promoted employees to the position of wastewater treatment operator at the request of Local 735, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (Union) as a political favor to the Union.

WE WILL NOT promote employees to the position of waste water treatment operator at the Union's request as a political favor to the Union, favoring the employees promoted and blocking the promotions of the other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days of the Board's Order (a) rescind the promotions of Steve Bonzack and Don McConnaughey, and (b) repost the 5850 Waste Water Treatment Operator Vacancies, evaluate all employee applicants based on non-discriminatory, neutral criteria, and offer the two most qualified employees immediate and full promotion to the position of waste water treatment operator with retroactive seniority, and make them whole for any losses they may have suffered, with interest.

GENERAL MOTORS CORPORATION